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May 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 25, 2004

Case No.: TIA-0286

XXXXXXXXXX and XXXXXXXXXXXX (the Applicants) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits, based on the employment of their late father (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the claimed illnesses were not related to work at the DOE. The OWA accepted the Panel's determination, and the Applicants filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an

application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicants seek review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicants' appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicants filed a Subpart B application with DOL. The DOL rendered a positive Subpart B determination on lung cancer.

The Applicants also filed a Subpart D application with OWA, claiming lung cancer, chronic obstructive lung disease (COPD), prostate cancer, and heart disease. The OWA referred the claims to the Physician Panel.

The Physician Panel issued a negative determination on the claims, and the Applicants appealed. In their Appeal, they state that they disagree with the determination and intend to submit additional medical records.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

As an initial matter, we note that the positive DOL Subpart B determination on lung cancer renders moot the Panel's determination on that illness. A positive DOL Subpart B determination satisfies the Subpart E requirement of a nexus between a claimed illness and a toxic exposure at DOE. Authorization Act § 3675(a).

With respect to the remaining illnesses, the Applicants have not identified Panel error. The Applicants' disagreement with the Panel determination and intention to submit additional information is not a basis for finding Panel error. If the Applicants believe that they have additional information relevant to their Subpart E claim, they should contact the DOL on how to proceed.

As the foregoing indicates, the Applicants have not demonstrated Panel error and, therefore, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0286, be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 3, 2005